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Alleged $636M Deal Error Shows Value Of Old-School Methods

By **Richard Leisner** (October 2, 2023, 3:36 PM EDT)

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News stories about Adelman v. Proskauer Rose LLP[1] caught my attention this spring: A nationally prominent firm was accused of malpractice, allegedly arising from a cut-and-paste error and resulting in potential damages of $636 million.[2]

In a May decision, the Suffolk County Superior Court of Massachusetts **rejected defense motions** for summary judgment. Attempts at **mediation** that followed were unsuccessful,[3] and by August the case was **set for trial** in Massachusetts state court in 2024.

In September, the parties **jointly filed** a two-page motion to dismiss the case with prejudice.[4] Settlement terms were not disclosed. Given the procedural status of the case and the $636 million damage claim, it may be fair to presume the defendant paid a substantial amount to avoid the uncertainties of a jury trial.

Although the settlement resolves the malpractice claim, lessons that may be learned from the details of this case merit additional consideration.

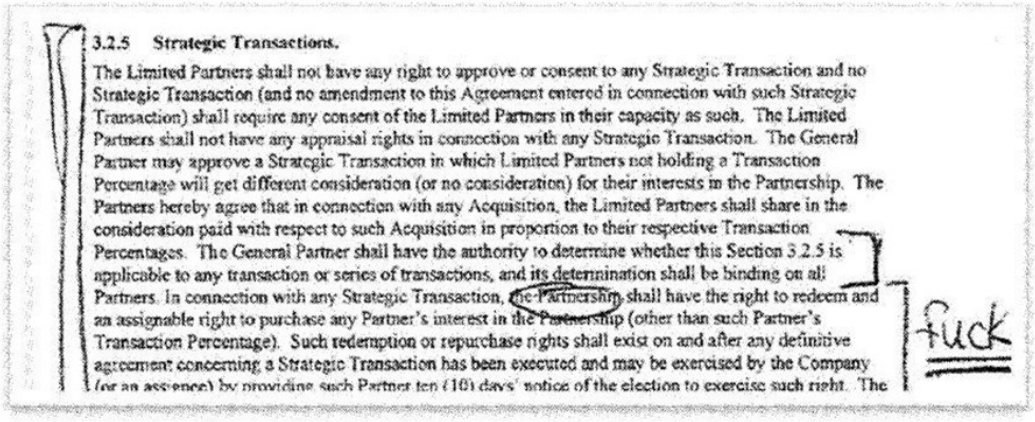
The litigation stems from a complex reorganization of the legal and economic interests of successful venture capitalists and hedge fund operators Robert Adelman and Behzad Aghazadeh.

According to Adelman's court filings, Proskauer — as lawyers for Adelman in the reorganization — included Section 3.2.5 in the first draft of a key transaction agreement. Neither of the parties requested Section 3.2.5, and it was not the subject of negotiation.

After the initial closing, Aghazadeh relied on Section 3.2.5 to undertake a series of transactions — the completion of which would be extraordinarily disadvantageous to Adelman's economic interests.

The first step sufficiently concerned Adelman that he set up a telephone conference with Proskauer and asked about, among other topics, the purpose and operation of Section 3.2.5. According to Adelman, no one at Proskauer gave a substantive answer.

In discovery, Proskauer produced a version of the agreement: The page with Section 3.2.5 included a handwritten comment featuring a single profane word opposite the section. This image was reproduced in Adelman's summary judgment memorandum,[5] as well as in the May court opinion.



3.2.5 Strategic Transactions.

The Limited Partners shall not have any right to approve or consent to any Strategic Transaction and no Strategic Transaction (and no amendment to this Agreement entered in connection with such Strategic Transaction) shall require any consent of the Limited Partners in their capacity as such. The Limited Partners shall not have any appraisal rights in connection with any Strategic Transaction. The General Partner may approve a Strategic Transaction in which Limited Partners not holding a Transaction Percentage will get different consideration (or no consideration) for their interests in the Partnership. The Partners hereby agree that in connection with any Acquisition, the Limited Partners shall share in the consideration paid with respect to such Acquisition in proportion to their respective Transaction Percentages. The General Partner shall have the authority to determine whether this Section 3.2.5 is applicable to any transaction or series of transactions, and its determination shall be binding on all Partners. In connection with any Strategic Transaction, the Partnership shall have the right to redeem and an assignable right to purchase any Partner's interest in the Partnership (other than such Partner's Transaction Percentage). Such redemption or repurchase rights shall exist on and after any definitive agreement concerning a Strategic Transaction has been executed and may be exercised by the Company (or an assignee) by providing such Partner ten (10) days' notice of the election to exercise such right. The

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Adelman asserted that Section 3.2.5 was the result of a "botched cut-and-paste," imported from another Proskauer transaction.[6] In its responsive memorandum, Proskauer did not dispute Adelman's version of the provision's provenance or its adverse operation for Adelman.

While some may enjoy a measure of schadenfreude for a BigLaw partner's mistake and its adverse consequences, experienced deal lawyers will be thinking to themselves, "There but for the grace of the almighty go I."[7]

I wondered if the wrong provision could have been caught before the draft was sent to the counterparty. After an analytical walk down memory lane of old-time deal document drafting practices, we can consider if the use of allegedly outdated procedures could reduce the likelihood of this or other future drafting errors.

A Short Trip Back to the Good Old Days

Deal documentation has changed dramatically since my "baby lawyer" days. When I began my career, attorneys were not making documents at their desks on computers, and there was no internet, no email, no high-speed laser printers with automatic sheet feeders and no sophisticated software.

Deal documents were made on typewriters or early word processing equipment, and their end products were pieces of paper, not electronic files.

Today, it is customary for a solitary attorney to create and edit key deal documents sitting in front of a flat screen monitor, email revisions to the working group or to the other side, and make revisions considering comments and suggested changes also received via email.

None of the lawyers, clients or other players need to be in the same room at the same time. All this is done with minimal or no staff assistance. It's common for an entire deal to be negotiated and concluded without the parties or their counsel ever meeting in person.

Typically, the professionals creating these pieces of paper in the old days were part of a multiperson team — one partner, one or more experienced associates, and a skilled nonlawyer assistant or two.

Revisions were marked by hand on paper and returned to staff to retype or enter. Attorneys seldom, if ever, found themselves working at a typewriter.

Corrections involving a few words would be made by painting over the words to be corrected with correction fluids brushed on the paper, similar to applying nail polish.

After a brief time needed to dry, the correction fluid left a smooth white space, covering the text to be corrected. The target page with the correction fluid white space would be advanced on the typewriter to the spot where the revisions could be typed in the correction fluid-created white space. Chemically treated small squares of paper or sticky tape provided similarly functioning alternatives to correction fluids.

Correction fluid and similar alternatives were not suitable when corrections were more extensive — several sentences or a whole page. The solution was cutting and pasting. The revised text would be typed on a clean sheet of paper and physically pasted on to the original with tape or glue.

Fast and efficient cutting and pasting was part of the stock and trade of experienced support staff and young lawyers. It is hardly a surprise that scissors and brush icons are used in word processing software.

Before track changes software, careful revision checking was a two-person job. One person read the corrected pages to the second, who was checking on the marked copy where the revisions were handwritten.

A faster process called "slugging" was also a two-person job. The first person started with the old draft pages, reading out loud the first word in each line on the page; the second person listened to the first, checking to see that the first word in each line on the updated version matched.

When the first person came to a spot where there were revisions in the old draft, the reader read all the revisions, not just the first word in the line. If the words on the revised draft didn't match up with the language on the marked draft, the process stopped to resolve the discrepancies.[8]

A veteran secretary and an associate attorney could slug their way through long documents quickly and accurately. Although faster to start, today's computer track changes output still has to be proofed. The output from a slugging session was already proofed.

As a deal moved ahead, or if there were particular time pressures, negotiations and document revisions might be conducted in person, with the principals from both sides and counsel in one location.

Suggested revisions were negotiated face-to-face, agreed to and handwritten on pages of a working draft. Agreed-upon changes were given to the staff, several pages at a time, to prepare revisions in real time. Revised pages were delivered back to the working group, with each participant receiving their own set of revised pages.

Every partner, associate and legal assistant on both sides would be present in one location and looking at their own individual set of revised pages.

The process of negotiating, hand-marking and producing revised pages for real time review by the entire group was repeated until every page of the agreement had been negotiated, revised and approved.

The final corrected paper document, called the "ribbon copy," was often something of a mess — pages covered in splotches of correction fluid or made thicker by the addition of multiple cut and pasted inserts.

These pages were photocopied one page at a time.[9] An unsightly master ribbon copy was perfectly serviceable for producing clean execution documents on photocopy paper.

Meals were delivered, allowing the parties to continue working. Frequently, these sessions would begin in the morning and conclude late at night or early the next day — or the day after.

An unanticipated benefit of the old multiparty document drafting and review practices is the number of times a professional handled a paper draft. As described above, paper deal documents passed through the hands of several team members for each side of a deal, providing multiple opportunities to catch an error.

Today, not so much.

When Going Fast Isn't That Fast

I know my younger colleagues roll their eyes when I tell stories about the good old days, and point

out how much longer the old ways took. But it is not a certainty that the total time from start to finish was longer in the past than currently.

Consider these facts: (1) In-person negotiating sessions may have lasted a long time, but they were continuous and usually concluded in one or two days; and (2) when they were done, the deal had been agreed to by the parties.

Today, quickly turned-around drafts may be ignored for hours or days, and even if a new draft is reviewed immediately, some parties simply revise and circulate a new draft without ever seeking negotiation of unresolved terms.

When negotiations take place with a single attorney viewing a revised draft on a flat screen, there may be little reluctance to raising new deal points or repeating old ones that were previously rejected.

In contrast, it was more difficult during extended in-person negotiations to raise new issues or repeat old ones, especially when what had been agreed to was in black and white on the paper pages distributed to the parties at the meeting.

Getting Practical Today — Go Fast, But Don't Hurry

Here are some suggested old-school ways to hurry less while still moving pretty fast.

1. Check every number.

Hand-check on a paper copy everything with a number. All dates, the number of days within which to do certain things, and even the automatically generated page numbers can be thrown off by certain document formatting.

Give special attention to all dollar amounts. Consider spelling out in words key numbers — e.g., "$100.00 One Hundred Dollars and 00/cents." Using words may seem particularly old-fashioned, but it could have prevented a real life $92 million error, such as in the 1991 case of Prudential Insurance Co. v. Dewey Ballantine Bushby Palmer & Wood.[10]

2. Don't forget the simple stuff.

Early on, double-check the spelling of all parties' names — individuals, entities, investment bankers, counsel and CPAs. The same goes for street addresses, email addresses and dates.

If you fail to do this on the first draft, modern software may think your mistake is correct and leave the error in place.

3. Test and illustrate formulas.

Conversion formulas, anti-dilution provisions, earnouts and other formulas deserve special attention. Don't just describe the formula in words.

Reproduce the formula as you would use it, for example, as below:

$$\frac{X + Y + 65\%(EBITDA2023)}{\text{Funded debt in excess of } \$Z}$$

Where complex calculations are involved, include in the text of the agreement an example of how the formula works with actual numbers for each element and make actual computations.

You can introduce an example with language like: "For the avoidance of doubt, the operation of the foregoing [conversion formula] is illustrated with the following example ..."

4. Scrutinize key deal provisions.

All deal document provisions are equally important to get right, but some provisions are more important to get right than others. Identify the core issues in your deal, and take particular care to keep track of and scrutinize provisions regarding those issues.

Issues likely to fall into this category may include:

- Defined terms that are deal-specific;
- Terms with specific meanings that affect formulas, such as "EBITDA" or "material acquisition";
- Any even slightly unusual amendment to entity governing documents;
- Transactions that affect, change or redeem equity ownership of any party;
- Transactions over which an individual deal party has an actual or effective one-vote veto power; and
- Any material conflict-of-interest transaction.

Each key deal provision should be subject to a stand-alone review distinct from the general review procedures described below.

5. Be wary of whole sections imported from other deals.

You may believe that complex provision used in another deal is perfect for your current deal. Before you cut and paste it into your current deal, cut and paste it as a separate document.

Review the operative terms, and consider what is different in the current deal from the seemingly perfect provision.

Make any changes to deal-defined terms, entity names, dollar amounts, etc. Print out the new provision and review the paper version.

Only then should you paste this perfect provision into your deal.

6. Use a paper draft to keep track of changes to be made.

You have the changes to be made, either on a hand-marked paper draft or a track changes document on the screen. If the changes are on a screen, print out the track change document.[11]

Now start to make the changes on the new version, marking off each change on the paper copy as you enter it on the new version.

When all the changes are completed, run track changes against the draft on which the changes were made, and move on to the next tip to check your changes.

7. Use track changes to check your changes.

Run track changes on your newest version and print it out. Also print out a clean version of the revised document. Lay the clean revised document next to the latest track changes version and the

paper copy of the draft you used to make the latest changes.

Now you have three copies of your working draft. Use the latest track changes version to find the changed provisions on the latest clean version. Mark off each change that is properly incorporated into the clean latest version. If you come to a place where one of the three versions do not match, stop and check again. Correct as needed.

When all the changes are checked off as correct, you are ready to distribute this latest draft to the internal working group or counsel for the counterparty.

8. On deals that are big enough, get a cold review from a colleague.

The colleague — ideally a senior colleague — should be someone who is not working on the deal, but who understands your practice area. You may not always have time to get such a review, but, especially on big deals, it is very much worth the time and effort.

It bears repeating that each of the foregoing procedures calls for paper documents — not an on-screen review. We tend to make fewer mistakes reviewing paper documents. Do not allow yourself to be fooled into believing that it is OK for you to skip the use of paper copies.

These suggestions will add only a few minutes to a project that involves many hours of work. Besides, it is much less time than you will have to spend if you wind up with a fact situation similar to that faced by the Proskauer lawyers.

What About AI?

It may be suggested that the results for Adelman and his counsel would have been different if Proskauer had employed ChatGPT[12] or another artificial intelligence program specialized for corporate transactions attorneys.[13]

I don't believe the current generation of AI software would be successful in finding out the issue with Section 3.2.5.[14] Even a series of single prompts would be challenged to provide the AI program a detailed understanding of the basic deal points of the complex reorganization transactions on which the documents were based, the consequences to the parties of Aghazadeh undertaking the several steps permitted by Section 3.2.5, and their disastrous impact Adelman's business objectives.[15]

Further down the AI development road, the answers may be different. For now, I recommend consideration of the previously mentioned practical suggestions.

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[1] The case attracted substantial legal news coverage, such as: "Did 1 contract clause cause Proskauer client's $636M loss? Judge refuses to toss malpractice suit," ABA Journal News, Latest News, May 17, 2023 (available at https://www.abajournal.com/news/). "Proskauer Rose Must Stand Trial in $636 Million Malpractice Suit," Bloomberg Industry Group, May 17, 2023 (available at https://www.bloombergindustry.com/). "Proskauer Eyes Early Win in Copy-Paste Malpractice Suit," LAW360, May 9, 2023 (available at www.law360.com).

[2] Adelman v. Proskauer , May 16, 2023, 2023 WL 3764934 (Mass. Super.) (p.4, Trial Order). The author is responsible for the censorship of the well-known profane noun/verb/adverb appearing uncensored in both the Court's opinion and the plaintiff's summary judgment memorandum.

[3] Letter from Plaintiff's counsel dated August 11, 2023 and proposed schedule for pretrial filings and request for hearing, as filed with the court August 11, 2023.

[4] Stipulation of Dismissal with Prejudice filed September 22, 2024, Mass. Sup. Ct. Doc. No. 2084CV00735.

[5] Plaintiff's Memorandum in Opposition to Defendant's Summary Judgment Motion (filed April 18, 2023) (available at https://www.masscourts.org/eservices/home.page.2).

[6] Plaintiff's Memorandum, p. 4.

[7] The Plaintiff's Memorandum casts "cutting-and-pasting" agreement provisions in a negative light, possibly leading a reader unfamiliar with deal document drafting practices to believe that "cutting and pasting" inherently breaches the standard of care for business lawyers. This characterization is unfair and inaccurate. It is standard operating procedure, and very much in accord with the standard of care, for experienced deal lawyers to make use of provisions crafted in other deals. Standard of care issues should consider what steps counsel take after "cutting" precedent provisions from other work to confirm, before "pasting" the provision into the new agreement, that the precedent provision accurately carries out the intent of the document drafter and supports their client's interests.

[8] "Redlining" was also done by hand, usually by a secretary or staff person using the draft with hand-written revisions as a basis for "marking" the changes on the "clean" revised draft.

[9] High speed automatic sheet feeders were not in widespread use until the 1980s. Besides, because of their thickness, heavily corrected pages would jam even modern sheet feeders.

[10] Prudential Ins. Co. of America v. Dewey Ballantine, et al. 170 A.D.2d 108, 573 N.Y.S.2d 981 (N.Y. App. Div. First Dpt. 1991) and related cases. An "obvious error," leaving three zeros (000) off the operative provisions of what was intended to be a $92,000,000 ship mortgage instead was entered as a $92,000 mortgage. Following the debtor's default and bankruptcy, junior lien holders attempted to limit the intended $92 million lien to less than $100,000. The "obvious error" resulted in years of protracted multi-party litigation, including allegations of legal malpractice.

[11] Print track changes in color, printing only additions and deletions. To make sure the track changes print out occupies the full width of the page and is at least 12 points, turn off comments and other features that would cause the printed copy to occupy less than the full width of the page and use a smaller font that could be difficult to read.

[12] Reference to Chat GPT is intended as a convenient way of referring to any and all publicly available large language modeling generative artificial intelligence programs. For purposes of this article, only "free" artificial intelligence programs were used. Plug-ins available on the subscription version of Chat GPT were not used.

[13] As of the time this article is being written artificial intelligence "add ons" have found their way into ubiquitous applications, such as in Google, Bing and Westlaw Precision.

[14] It is possible that Drafting Assistant or similar program would have "caught" the typographical error of omitting "000" from the $92 million ship mortgage in Prudential Ins. Co. of America v. Dewey Ballantine, et al. infra (Note11), possibly identifying the improper dollar amount as a cross-reference or definition error.

[15] The author did not undertake any prompts with an artificial intelligence program regarding the subject matter of the Proskauer case.